

1 THE HONORABLE JAMES L. ROBART
2
3
4
5
6
7

8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT SEATTLE

11 0912139 B.C. LTD., a Canadian
12 corporation, and PAKAGE APPAREL
13 INC., a Canadian corporation,

14 Plaintiffs,

15 v.

16 RAMPION USA INC., a Washington
corporation, and RAMPION
ENTERPRISES LTD., a Canadian
corporation,

Defendants.

No. 2:18-cv-01464-JLR

PRE-HEARING STATEMENT AND
JOINT CLAIM CHART

17 Pursuant to the Court's Minute Order Setting Trial Dates and Related Dates (Dkt. 22), the
18 Standing Order for Patent Cases, and Local Patent Rule ("LPR") 132, Plaintiffs ("BN3TH") and
19 Defendants ("Rampion") submit the following Prehearing Statement and Joint Claim Chart with
20 respect to the asserted claims of U.S. Patent Nos. 9,687,030 (the "'030 Patent") and 10,034,496
21 (the "'496 Patent") (collectively, the "Asserted Patents") for the July 12, 2019 Markman hearing.

22 **A. BN3TH's Identification of Asserted Patent Claims and Accused Products:**

23 Pursuant to the Standing Patent Order, BN3TH asserts the following patent claims:

- 24 • U.S. Patent No. 9,687,030: Claims 1, 2, 5-10, 12, 14, and 15
25 • U.S. Patent No. 10,034,496: Claims 1-10, 13-15.

26 The products accused of infringement under each claim are as follows, based on the
information currently available to BN3TH, and with the understanding that discovery as to

1 Rampion's accused products is ongoing:¹

- 2 • Products Accused of Infringing U.S. Patent No. 9,687,030: Claims 1, 2, 5-10, 12,
 3 14, and 15: All Rampion NIGHT SHIFT products, including the Rampion
 4 NIGHT SHIFT 6" boxer brief, as well as any other products with substantially
 5 equivalent structure and function, regardless of whether distributed under
 6 Rampion's own brand(s), through any private label partner or by other means.
- 7 • Products Accused of Infringing U.S. Patent No. 10,034,496: Claims 1-10, 13-15:
 8 All Rampion SWING SHIFT, POWER SHIFT, DAY SHIFT, GEAR SHIFT, and
 9 LONG JOHN products, including the SWING SHIFT 3" trunk, the SWING
 10 SHIFT 6" boxer brief, the SWING SHIFT 9" long leg boxer brief, the POWER
 11 SHIFT 3" trunk, the POWER SHIFT 6" boxer brief, the POWER SHIFT 9" long
 12 leg boxer brief, the DAY SHIFT 6" boxer brief, the GEAR SHIFT 9" long leg
 13 boxer brief, the LONG JOHN long underwear. In addition, BN3TH accuses of
 14 infringement any other products with substantially equivalent structure and
 15 function, whether distributed under Rampion's own brand(s), through any private
 16 label partner, or through other means, including all products with Rampion's
 17 "JOEY POUCH" feature or equivalent structure and function.²

17 **B. Rampion's Identification of Invalidity Assertions:**

18 Rampion contends that all of the asserted claims of the '030 Patent and '496 Patent are
 19 invalid. All of the asserted claims are invalid under 35 U.S.C. §§ 102 and/or 103 as anticipated
 20 and/or obvious. All of the asserted claims of the '496 Patent are invalid under 35 U.S.C. § 112
 21

22 ¹ BN3TH served interrogatories on Rampion early in this case seeking to identify all products with the same
 23 structure and function as the listed accused products, and all changes and iterations to the designs of those products.
 24 To date, Rampion's interrogatory responses list only model names (Day Shift, Gear Shift, Swing Shift, Power Shift
 25 and Night Shift). Rampion has agreed to provide more detailed information, but is still compiling that information,
 26 and has not indicated specifically what information will be provided.

22 ² BN3TH objects to Rampion's invalidity assertions (Section B of this document) to the extent Rampion includes (1)
 23 invalidity contentions that are subject to BN3TH's pending motion to strike (ECF # 33) or (2) invalidity contentions
 24 that differ from and are broader than those disclosed in Rampion's original, first amended, or proposed second
 25 amended infringement contentions, and for which changes Rampion has not sought leave of Court or made a
 26 showing of good cause as required by LPR 124.

1 for lack of written description. Claim 2 of the '030 Patent and claim 2 of the '496 Patent are
2 invalid under 35 U.S.C. § 112 as indefinite. All of the asserted claims of the '030 Patent and
3 '496 Patent are also invalid for statutory and/or obviousness-type double patenting.

4 The following is a listing of prior art that anticipates or renders the claims obvious:

- 5 • Pub. No. US 2004/0025218 A1 (Huang) (the ““218 Publication”)
- 6 • WO 01/37687 A1 (Carrillo, et al.) (“WO 01/37687”)
- 7 • U.S. Patent No. 7,958,571 (Kitsch, et al.) (the ““571 Patent”)
- 8 • Pub. No. US 2008/0178369 A1 (Kitsch, et al.)
- 9 • Pub. No. US 2007/0277285 A1 (Gravette, et al.) (the ““285 Publication”)
- 10 • Pub. No. US 2009/0106874 A1 (Shlush) (the ““874 Publication”)
- 11 • WO 98/39981 (Hartley) (the ““981 Publication”)
- 12 • European Patent Application No. EP 0 476 818 A1 (Dagg, et al.)
- 13 • Canadian Industrial Design Registration No. 133058 (KE Imports) (the ““058
Design”)
- 14 • U.S. Patent No. 7,631,369 (Geiwald, et al.) (the ““369 Patent”)
- 15 • Pub. No. US 2007/0220660 A1 (Geiwald, et al.)
- 16 • Andrew Christian – Show-It Technology Brief, Underwear News Briefs, at
17 <https://www.underwearnewsbriefs.com/2009/03/andrew-christian-show-it-technology-brief/>, produced at Rampion_0000101-107
- 18 • Underwear of the Week – Andrew Christian “Show-It” Line, Underwear News
19 Briefs, at <https://www.underwearnewsbriefs.com/2009/03/underwear-of-the-week-andrew-christian-show-it-line/>, produced at Rampion_0000108-114
- 20 • Andrew Christian products with “Show-It” technology (also referred to as
21 Show-It Technology 2.0) (“Andrew Christian Show-It Underwear”)
22 (Rampion_0000101-107, Rampion_0000108-114, Rampion_0000115-121,
23 Rampion_0000122-128, Rampion_0000129-135, Rampion_0000136-142,
24 Rampion_0000143-149, Rampion_0000155-156, Rampion_0000157-159,

1 Rampion_0000160-161, Rampion_0000162-163, Rampion_0000164-166,
2 Rampion_0000198-200, Rampion_0000201-203, Rampion_0000204,
3 Rampion_0000205, and ACI000001-ACI000152)

- 4 • Printed publications describing Andrew Christian Show-It Underwear
5 (Rampion_0000101-107, Rampion_0000108-114, Rampion_0000115-121,
6 Rampion_0000122-128, Rampion_0000129-135, Rampion_0000136-142,
7 Rampion_0000143-149, Rampion_0000155-156, Rampion_0000157-
8 159, Rampion_0000160-161, Rampion_0000162-163, Rampion_0000164-166,
9 Rampion_0000198-200, Rampion_0000201-203, Rampion_0000204,
10 Rampion_0000205, and ACI000001-ACI000152)

- 11 • Saxx underwear products (The '571 Patent is currently assigned to SAXX
12 Holdings Inc. On information and belief, the Saxx Underwear products will
13 have the same or similar disclosure as the '571 Patent.) (Rampion_0000098-100,
14 Rampion_0000150-154, Rampion_0000197)

- 15 • Printed publications describing Saxx underwear products (Rampion_0000098-
16 100, Rampion_0000150-154, Rampion_0000197)

- 17 • Body Tech line from UnderGear featuring an “enhancement pouch”
18 (Rampion_0000155-156, Rampion_0000185-188, Rampion_0000189-192,
19 Rampion_0000193-196, Rampion_0000206-209)

- 20 • Printed publications describing products from the Body Tech line from
21 UnderGear featuring an “enhancement pouch” (Rampion_0000155-156,
22 Rampion_0000185-188, Rampion_0000189-192, Rampion_0000193-196,
23 Rampion_0000206-209)

- 24 • 2(x)ist products with “dual lifting technology” (Lift Collection)
25 • Printed publications describing 2(x)ist products with “dual lifting technology”
26 (Lift Collection)

The invalidity assertions listed above are based on the information currently

1 available to Rampion, and with the understanding that discovery is ongoing.³

2 **C. Agreed Claim Constructions:**

3 Pursuant to LPR 132(a), the parties have agreed to the constructions of the following
4 claim terms, phrases, or clauses:

Claim Term	Agreed Construction
“Pouch”	“a concave space”
Found in claims: 1, 9, and 15 ('030 Patent and '496 Patent)	
“Elastically Resilient Four-Way Stretch Material”	“fabric capable of stretching in each of two different directions (e.g., up/down <i>and</i> left/right or length <i>and</i> width) with substantial elastic recovery toward its pre-stretching size and shape”
Found in claims: 1 and 10 ('030 Patent and '496 Patent)	

12 **D. Joint Claim Chart:**

13 The Joint Claim Chart, together with exhibits consisting of the asserted patents, the
14 relevant portions of the prosecution histories, and cited dictionaries, treatises, and other extrinsic
15 evidence required by LPR 132(b)-(c) and the Standing Patent Order, is filed herewith. The ten
16 most important disputed claim terms as agreed by the parties are identified with an asterisk (*) in
17 the Joint Claim Chart (and are the first 10 claim terms listed in the chart).⁴

18 **E. Anticipated Length of Time Necessary for the Claim Construction Hearing:**

19 Pursuant to LPR 132(d), the parties agree that the 5-hour day provided for in the Standing
20 Patent Order is an appropriate length for the claim construction hearing in this case.

21 **F. Proposed Order of Presentation for the Claim Construction Hearing:**

22 ³ Rampion has pending third party subpoenas issued to Andrew Christian, Inc. (regarding the Andrew Christian
23 Show-It Underwear), Hanover Direct, Inc. (regarding the Body Tech line from UnderGear featuring an
24 “enhancement pouch”), and Jacques Moret, Inc. (regarding the 2(x)ist products with “dual lifting technology” (Lift
25 Collection)). This Court has also granted Rampion’s motion for issuance of letters rogatory regarding Saxx
underwear products, and Rampion is working with counsel for Saxx Underwear Co. to obtain the requested
documents and things, if any.

26 ⁴ Two additional terms are disputed and listed in the joint claim construction chart, beyond the ten terms indicated
for claim construction briefing with asterisks. The parties anticipate continuing to meet and confer regarding these
two terms prior to the claim construction hearing and, if necessary, following the claim construction hearing to
determine if any continuing dispute remains after related terms are construed.

1 Pursuant to LPR 132(e), the parties propose a “ping-pong” order of presentation, with
2 both parties addressing one term to conclusion before moving on to the next term, and taking
3 turns presenting first on individual terms.

4

5 **G. Parties’ Position on Live Testimony, Tutorials, and Any Pre-Hearing
6 Conference for the Claim Construction Hearing:**

7 Pursuant to LPR 132(f), the parties do not believe that live testimony should be presented
8 at the claim construction hearing and neither party intends to present live witness testimony. Nor
9 do the parties believe that a tutorial or a pre-hearing conference is needed before or in connection
10 with the claim construction hearing in this matter. See LPR 132(g)-(h)

11 **H. Parties’ Position on Appointment of an Independent Expert:**

12 Pursuant to LPR 132(i), the parties do not believe that appointment of an independent
13 expert is necessary in this case.

14 RESPECTFULLY SUBMITTED:

15 Dated: May 1, 2019

16

17 DORSEY & WHITNEY LLP

18 /s/ Erin Kolter

19 (via email authorization)
20 Paul Meiklejohn, WSBA No. 17477
Erin Kolter, WSBA No. 53365
21 701 Fifth Avenue, Suite 6100
Seattle, WA 98104
22 Telephone: (206) 903-8800
Email: meiklejohn.paul@dorsey.com
Email: kolter.erin@dorsey.com

23 Attorneys for Defendants

24

25

26

STOEL RIVES LLP

/s/ Brian C. Park

Brian C. Park, WSBA No. 25584
600 University Street, Suite 3600
Seattle, WA 98101-4109
Telephone: (206) 386-7542
Email: brian.park@stoel.com

/s/ Steven T. Lovett

Steven T. Lovett (admitted pro hac vice)
steve.lovett@stoel.com

/s/ Nathan C. Brunette

Nathan C. Brunette (admitted pro hac vice)
nathan.brunette@stoel.com

1 760 S.W. Ninth Avenue, Suite 3000
2 Portland, OR 97205
3 Telephone: (503) 224-3380
4 Facsimile: (503) 220-2480

5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Attorneys for Plaintiffs

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I served the foregoing **PRE-HEARING STATEMENT AND**
3 **JOINT CLAIM CHART** on the following named person(s) on the date indicated below by

- 4 .. mailing with postage prepaid
5 .. hand delivery
6 .. facsimile transmission
7 .. overnight delivery
8 ..X CM/ECF notification

9 Paul Meiklejohn
10 meiklejohn.paul@dorsey.com
11 Erin Kolter
12 kolter.erin@dorsey.com
13 Dorsey & Whitney LLP
14 701 Fifth Avenue, Suite 6100
15 Seattle, WA 98104

16 Attorneys for Defendants

17 DATED: 5/1/2019

18 */s/ Nathan C. Brunette*

19 Brian C. Park, WSBA No. 25584
20 Steven T. Lovett (*admitted pro hac vice*)
21 Nathan C. Brunette (*admitted pro hac vice*)

22 Attorneys for Plaintiffs